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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND BLACK PRE-LAW ASSOCIATION,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve a conflict among the Circuits as to the standard to determine whether a party may intervene as a matter of right under Rule 24(a), Fed. R. Civ. Proc., when the party on whose side the intervenor seeks to join is a governmental agency?

2. Were petitioner organizations of African-American students improperly prevented from protecting their members' constitutional and statutory rights to seek admission to the University of Texas Law School free of racial discrimination when the courts below refused to allow them to intervene in this lawsuit -- in which white plaintiffs seek to bar any consideration of race in the Law School's admissions process -- even though Petitioners sought to offer evidence and present defenses which the other parties to the case refused to advance, and which Petitioners contend establish the need for the Law School to take race into account in making admissions decisions in order to mitigate the continued effects of its own (and other Texas governmental entities') prior, intentional racial discrimination and in order to neutralize the racially discriminatory impact of other admissions criteria utilized by the Law School?

3. Did the courts below err in finding that a State whose higher educational system continues to be subject to the mandate of the federal executive agency enforcing Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000d) requiring that it dismantle the remaining vestiges of its prior dual structure, could and would adequately represent the interests of African-American students who were the intended victims of the discriminatory practices which pervaded and underlay that dual structure?

4. Did the court below so far depart from the accepted and usual course of judicial proceedings in applying the "law of the case" doctrine to issues that patently were not decided

in prior proceedings (and which the panel itself characterized as having been, at best, "implicitly decided") as to warrant correction by this Court in the exercise of its supervisory authority?

PARTIES TO THE PROCEEDING

The parties to the litigation are:

Petitioners (Proposed Intervenors):
Thurgood Marshall Legal Society
Black Pre-Law Association

Plaintiffs (Respondents):
Cheryl J. Hopwood
Douglas W. Carvell
Kenneth R. Elliot
David A. Rogers

Defendants (Respondents):

The State of Texas
The University of Texas Board of Regents
Bernard Rapoport, Ellen C. Temple, Lowell H. Leberman, Jr., Robert J. Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Martha E. Smiley, and Mario Ramirez, members of the University of Texas Board of Regents
The University of Texas at Austin
Robert M. Behrdahl, President of the University of Texas at Austin
Mark Yudof, Dean of the University of Texas Law School
Stanley Johanson, Professor of Law at the University of Texas School of Law

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The opinion of the United States Court of Appeals for the Fifth Circuit was filed on March 18, 1996, is reported at 78 F.3rd 932 (5th Cir. 1996) and is reprinted in the Appendix at 1a-93a.

The May 1`, 1994 opinion of the United States Court of Appeals for the Fifth Circuit affirming the initial denial of intervention is reported at 21 F.3d 603 (5th Cir. 1994) (per curiam) and appears at 94a-100a. The August 19, 1994 opinion of the United States District Court for the Western District of Texas declaring unconstitutional the admission process used at the University of Texas Law School is reported at 861 F. Supp. 551 (W.D. Tex. 1994) and can be found in the appendix at 101a-187a. On January 24, 1994, the District Court denied the Petitioners' first motion for intervention the unpublished decision of the district court is contained in the appendix at 190a-195a. An unpublished order entered on July 15, 1994 by the District Court for the Western District of Texas denying Petitioners' second motion for intervention appears at 188a-189a. On March 18, 1992, Petitioners' suggestion for rehearing en banc was denied. This denial can be found at 196a-198a. The Fifth Circuit on April 23, 1996 issued two opinions of seven of the sixteen judges dissenting from the Court of Appeal's failure to grant rehearing en banc in this case and the consolidated case on the merits both of which appear at 196a-210a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals was filed on March 18, 1996. The Order denying the petition for rehearing was entered April 4, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall . . . deny any person within its jurisdiction the equal protection of the laws.

The case also involves Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which states:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The case also involves Fed. R.Civ. P. 24 (a), which states, in relevant part:

> Intervention of Right. Upon timely application anyone should be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

A. Proceedings Below

This suit was initiated by the filing of two complaints on September 29, 1992 and April 23, 1993 by two separate groups of white plaintiffs who had unsuccessfully applied for admission to the University of Texas Law School (hereinafter "the Law School") for the school year beginning in 1992. Plaintiffs claimed that the consideration of race by the Law School as part of a remedial policy of affirmative action in admissions violated the Fourteenth Amendment to the United States Constitution; 42 U.S.C. §§ 1981 and 1983;

and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq.

The district court bifurcated the procedural and merits issues and allowed the commencement of discovery related solely to issues of standing and ripeness. The State of Texas filed a motion for summary judgment on procedural grounds on August 13, 1993 which the District Court denied on October 28, 1993. On November 17, 1993, the Court authorized the beginning of merits discovery.

On January 5, 1994, less than two months after the beginning of discovery and nearly three months before its scheduled completion, Petitioners first moved to intervene in the case. Petitioners are two organizations of African-American students. The first, the Black Pre-Law Association (hereinafter "the BPLA") of the University of Texas at Austin, consists of undergraduate students interested in attending law school, including at the University of Texas. Each year, a number of BPLA's student members have applied for admission to the Law School.

The second organization, the Thurgood Marshall Legal Society ("TMLS") is an association of students at the Law School dedicated to advancing legal education for African-Americans and serving the legal and other needs of African-Americans.

Petitioners sought intervention as a matter of right under Fed. R. Civ. P. 24(a), as well as permissive intervention pursuant to Fed. R. Civ. P. 24(b). They alleged that the State could not adequately represent their interests because of 1) the long history of the State's discrimination against African-Americans; 2) the State's need to balance the defense of the affirmative action program against other interests such as fiscal responsibility, administrative concerns and public opinion (which would necessarily constrain the defense of affirmative action); and 3) the fact that the

Petitioners were in a better position to present evidence of recent discrimination. 97a.

In its order denying intervention as of right, 90a, the District Court, citing the Fed. R. Civ. P. and *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), relied upon a presumption that the State could be counted upon to adequately defend its own affirmative action program, and dismissed as speculative the Petitioners' concerns that the State would not fully represent their interest in the upcoming hearing.

The district court also denied permissive intervention on the ground that adding Petitioners to the case "would needlessly increase cost and delay disposition of the litigation." 194a.

On appeal, the Fifth Circuit upheld the denial of intervention as of right, articulating both the general presumption of adequate representation by existing parties cited by the District Court and a more stringent presumption applicable to cases involving state parties and governmental agencies:

> where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required . . . . In a suit involving a matter of sovereign interests, the State is presumed to represent the interests of its citizens.

97a-98a (citations omitted).

The Fifth Circuit ruled that these presumptions had not been overcome because Petitioners had demonstrated neither that the State would not strongly defend its affirmative action program nor that the Petitioners had a separate defense of the affirmative action plan that the State would not present at hearing. In reaching these conclusions, the Court relied explicitly upon its expectation that the State would present at the forthcoming trial

evidence that Petitioners felt was necessary to protect their interests:

> Although the BPLA and TMLS may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the State. The BPLA and the TMLS have been authorized to act as *amicus* and we see no indication that the State would not welcome their assistance.

98a.[1]

At the ensuing trial, the district court limited Petitioners' role to that of *amici curiae* and afforded them no opportunity to introduce evidence or argue before the court. Following the direction of the Fifth Circuit, Petitioners provided the State of Texas with evidence showing that the Texas Index, a statistical measure combining undergraduate grade-point average and LSAT scores used in sorting applicants to the Law School, could not reliably predict law school performance of first-year African-American students and offered the State the testimony of an expert qualified to present evidence that race-conscious admissions to the Law School were necessary to avoid the discrimination and potential Title VI liability that would result from reliance on the Texas Index exclusively.[2] The state declined to introduce the evidence or the testimony of the expert witness, presented no evidence concerning the validity of the Texas Index and

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[1]Noting that the Fifth Circuit had never reversed a lower court's decision on Rule 24(b) permissive intervention, the Court found that the district court had not abused its discretion in denying petitioners' motion to intervene. 99a-100a.

[2]One need not presume animus on the part of the state to understand why such evidence would be awkward for the state to introduce.

raised no argument that race-conscious measures were required to mitigate the discriminatory effect of its use.

At the conclusion of trial, Petitioners submitted a post-trial *amicus* brief supporting the constitutionality of the Law School's admission policy. In the brief, Petitioners again argued (relying upon the declaration of the expert witness proffered to the State) that rather than being an unjustified preference for African-American students, the challenged race-conscious admission process was legally required to ameliorate the discriminatory impact of the Texas Index.

Plaintiffs moved to strike portions of Petitioners' post-trial amicus brief including the declaration. Although the district court denied the motion to strike, it indicated that it would consider only the evidence introduced at trial by the parties.

On July 12, 1994, before the district court had announced its judgment on the merits, Petitioners moved again to intervene for the limited purpose of introducing evidence supporting the independent defenses that the State failed to raise. The district court denied that motion without opinion on July 15, 1994. 188a-189a.

On August 19, 1994, the district court entered judgment on the merits for plaintiffs, holding that while certain types of race-conscious admissions are constitutionally justified at the Law School, the 1992 admissions policy under which the plaintiffs were considered and rejected was not "narrowly tailored" and was therefore unlawful. The court awarded plaintiffs nominal damages but declined to order that they be admitted or to enjoin defendants from any consideration of race in the admissions process. Although the district court recognized that formerly dual systems of higher education are "under an affirmative duty to eliminate every vestige of racial segregation and discrimination" pursuant to *United States v.*

Fordice, 505 U.S. 717 (1992), 151a, the court did not consider or address the separate defenses advanced by the Petitioners or hold that affirmative action by the Law School is necessary to avoid unlawful discrimination, as urged by the Petitioners.

Petitioners appealed from this second denial of intervention and plaintiffs appealed the district court's judgment on the merits. Petitioners argued that the district court had failed to recognize the significance of the State of Texas's unwillingness to raise the defense of its admission programs which the petitioners had proffered in the course of trial. Petitioners contended that the court's failure to allow limited intervention at the conclusion of trial based upon the fact that the State's conduct of its defense showed unequivocally that Petitioners' and the State's interests and defenses were divergent was error. As a result, Petitioners alleged that they were denied the opportunity to contribute evidence and defenses that would have compelled the court to acknowledge the remedial basis for the Law School's admission program and therefor effectively protect their interest in assuring the continued presence of African-American students to the Law School.

A panel of the Fifth Circuit affirmed the post-trial denial of intervention without addressing Petitioners' claim that the State's failure at trial to present the evidence which would have compelled the use of race-conscious admissions at the Law School constituted undeniable proof that Petitioners' interests were not in fact adequately represented.

Instead, the panel upheld the district court based on the doctrine of "law of the case", finding that the panel hearing the appeal of the first denial of intervention had "implicitly" addressed the legal questions raised in the second intervention motion -- even though that motion was not made until after the completion of trial and after it had become clear that the first panel's expectation that the State

would advance arguments urged by the plaintiffs was not to be realized.

At the same time, the Fifth Circuit reversed the district court regarding the merits case, holding in sweeping terms that the law school may not use race as a factor in admissions and dismissing out of hand the use of race to achieve diversity in an academic setting as well as all arguments that the use of race-conscious admissions was necessary to address the present effects of past discrimination.

Petitioners then suggested rehearing *en banc* on the issue of denial of intervention.[3] On April 9, 1996, the Court denied rehearing *en banc* and announced the forthcoming release of a dissent from the denial. On April 23, 1996, the two dissenting opinions from the denial of rehearing in both of the consolidated cases were released. The first, written by Chief Judge Politz and joined by six additional judges, faulted the Court for denying rehearing of a panel decision which the dissenters felt "departed from the normal considerations of judicial restraint" by addressing issues that had not been properly raised in the case below and by effectively overruling this Court's decision in *Bakke*. Judge Stewart wrote separately to emphasize the historical irony of the Circuit's failure to grant rehearing and to condemn Petitioners' exclusion from the lawsuit through the denial of

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[3]The State did not seek rehearing. In their suggestion for rehearing, as they do now, while acknowledging their inability to seek rehearing in the merits case because they were not parties, having been denied intervention, Petitioners stated their belief that the issues decided in the consolidated merits appeal were of extraordinary public importance and had an impact on the interests of all African Americans, including those represented by Petitioners .Petitioners nonetheless stated their belief that rehearing would be warranted due to the importance of the issues raised as well as the apparent conflict between the panel's decision and the holding of this Court in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978).

intervention: "[a]s to the request to intervene, what class of persons is more qualified to adduce the evidence of the present effect of past discrimination than current and prospective black law students?" 209a.

B. Statement of Facts

The significance of the Fifth Circuit's exclusion of African-American pre-law and law students from participation in a case that could result in the implementation of an admission process that effectively (and unjustifiably) excludes African-American and Mexican American students from attendance at the University of Texas Law School can only be understood within the context of historical and current discrimination affecting students and applicants to the Law School and the continuing obligation of the Law School to remedy prior discrimination. For that reason, the facts of the merits appeal are in some measure inextricable from issues raised by the Petitioners. Accordingly, Petitioners submit that this Court should grant certiorari on the question of denial of intervention as well as on the merits, see Petition No. 95-1773, and the facts relevant to both are discussed briefly below.[4]

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[4]Petitioners recognize that, as non-parties, they cannot themselves seek review of the merits ruling, but they urge this Court to grant the Petition filed by the State of Texas with this Court on April 30, 1996. The decision of the Fifth Circuit prohibiting the consideration of race in the admissions process at the University of Texas conflicts with relevant precedents of this Court including *Regents of the University of California v. Bakke* and for the reasons given by the State and the dissenters from the denial of rehearing *en banc*, warrant review by this Court:

> [t]he radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation. A case of such monumental import demands the attention of more than a divided panel.

200a.

As discussed below, Petitioners believe that fairness dictates not

There is no dispute that the State of Texas was responsible for creating and maintaining a system of higher education rife with discrimination:

> Texas' system of higher education has a history of state-sanctioned discrimination. Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history.

106a.

From the mid-1800's until this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), the Law School operated with official admissions policies and practices that expressly excluded persons of African descent. The Texas Constitution and state statutory provisions restricted the school to white students, Tex. Const. art. VII, §7 (1925, repealed 1969), and at the time Heman Sweatt applied for admission to the Law School in 1946, no law school in the state of Texas admitted African-Americans. 106a. The State's response to *Sweatt's* exposure of the complete absence of legal education for African-Americans was inadequate: "The State hastily created a makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited. 106a-107a, citing *Sweatt v. Painter*, 339 U.S. at 632.

This Court's unanimous decision requiring that the University of Texas admit Mr. Sweatt did not halt the flagrant discrimination to which he and other minority students were subjected. As the district court found, the end of explicit racial prohibitions did not root out deeply

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only a review of the merits appeal but also the inclusion of Petitioners both to assure that no decision of such import is made without a complete record and to assure participation in the process by those who had suffered most from prior discrimination and who stand to lose the most by an adverse ruling in the matter.

entrenched discrimination at the Law School: "Sweatt left the law school in 1951 without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings." 107a.

The district court found that the University of Texas continued discriminatory policies for decades after the *Sweatt* decision. In the 1950s and 60s, the Texas Board of Regents prohibited blacks from living in or even visiting white dormitories and assigned Mexican-American students to segregated housing. 107a. In the 1960s, Mexican-Americans and African-Americans were also excluded from membership in most University-sponsored organizations. *Id.*

Continuing discrimination was not limited to treatment accorded minorities upon their admission to the Law School. The record indicated that barriers to admission in the law school remained in place long after the *Sweatt* decision. Notwithstanding the minimal standards for admission that were in place until 1965, the number of African-American students admitted was extremely small. 112a.

Although the Law School tried to increase minority representation in the student body in the late 1960s through participation in the Council on Legal Education Opportunity (CLEO,) a program that provided summer training at participating law schools for minority graduates of various universities, the Law School's involvement was short-lived, as were any gains in minority participation. During the 1971-72 admission cycle, after the Law School ended its participation in the CLEO program, the Law School admitted no African-Americans . 114a.

The first serious effort to remedy segregation at the Law School came as a result of an action brought against the United States Department of Health, Education and Welfare ("HEW"), the predecessor to the United States Department of Education. In 1970, a class of African-American students

in 17 Southern and border states, including Texas, sued HEW asserting that the federal government's funding of state systems of higher education that discriminated against African-Americans by operating segregated institutions violated Title VI of the Civil Rights Act of 1964 and the U.S. Constitution. *Adams v. Richardson*, 351 F.Supp. 636 (D.D.C. 1972), 356 F.Supp. 92 (D.D.C.), *modified* and *aff'd unanimously en banc*, 480 F.2d 1159 (D.C. Cir. 1973), *dismissed sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). The district court ordered the federal government to enforce Title VI in higher education.

In 1980, the *Adams* plaintiffs sought further relief with respect to the higher education systems in Texas and other states. In 1981 the Office for Civil Rights of the United States Department of Education ("OCR") found that Texas had "failed to eliminate the vestiges of its former *de jure* racially dual system of public higher education, a system which segregated blacks and whites." 109a.

In 1982, the Assistant Secretary of Education informed the State defendants that existing plans, which included a commitment to the goal of equal educational opportunity and student body desegregation for both blacks and Hispanics, were insufficient to eliminate the vestiges of past discrimination. The plan's goals for the enrollment of African-American and Hispanic students fell short of the State's earlier commitment to seek enrollment of those groups in proportion to their representation among graduates of the State's undergraduate institutions. 104a-110a referring to Letter of Assistant Secretary of Education Clarence Thomas, D-284. The defendants responded with a revised plan, which OCR rejected, in part because it did not set targets for increasing minority enrollment for each institution. Id.

On March 23, 1983, the district court ordered OCR to commence formal enforcement proceedings against Texas

within 45 days, unless OCR concluded that Texas had submitted a desegregation plan in full conformity with governing law. 110a. After the 1983 *Adams* Order, Texas submitted an amended plan to OCR in which it committed itself to improved measures to meet enrollment goals for black and Hispanic students in its professional schools. Under this plan, defendants agreed "to consider each candidate's entire record and [to] admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all traditional admission requirements." 110a. The plan was subject to monitoring for compliance until 1988. 111a.

In 1987, OCR contacted state higher education authorities informing them that a final evaluation would have to be conducted prior to the expiration of the plan the following year in order to determine if the State met its obligations. 111a. Having itself determined that the goals and objectives of the plan had not been met, the State voluntarily developed a successor plan. *Id.* As of the time of the district court's ruling in this case, OCR had not completed its evaluation of Texas' compliance with Title VI. 112a. In January 1994, the Department of Education notified Governor Richards that OCR was continuing to oversee Texas' efforts to eliminate all vestiges of *de jure* segregation and that it would be reviewing the Texas system in light of *United States v. Fordice*, 505 U.S. 717 (1992).

In addition to its findings about the continuing vestiges of discrimination in the Law School, the district court made findings that placed the Law School within the context of education statewide.[5] As is true in the area of higher education, Texas has a long and lingering history of discrimination at the elementary and secondary school levels:

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[5]Since state law requires that enrollment at the Law School must consist of 85% Texas residents, the majority of law students attended Texas schools at earlier stages of their academic careers. 128a-129a.

"[t]he history of official discrimination in primary and secondary education in Texas is well documented in history books, case law and the record of this trial." 104a. *See also LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993, *cert. denied*, 114 S. Ct. 878 (1994)(recognizing that the long history of discrimination against African-Americans and Hispanics in all areas of public life is beyond dispute). Indeed, the State of Texas and virtually every major school system within it have been found by a court to have operated a racially dual system of education. *See e.g. Houston Independent School District v. Ross*, 282 F.2d 95, 96 (5th Cir. 1960); *Borders v. Rippy*, 247 F.2d 268 (5th Cir. 1957)(Dallas); *United States v. Texas Education Agency (Austin)*, 467 F.2d 848 (5th Cir. 1972); *Flax v. Potts*, 204 F.Supp. 458 (N.D. Tex. 1962), *aff'd*, 313 F.2d 284 (5th Cir. 1963) (Ft. Worth); *United States v. State of Texas*, 321 F. Supp. 1043, 330 F. Supp. 235 (E.D. Tex. 1970), *aff'd with modifications*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (statewide relief).

Many of these districts have not been determined to have eliminated (to the extent practicable) all vestiges of the dual systems under which they once operated. The trial court expressly found that, as of May 1994, "the problem of segregated schools is not a relic of the past" as reflected in the fact that desegregation lawsuits remained pending against more than forty Texas school districts. 105a.

The court also found that persistent racial hostility at the Law School had perpetuated the perception that the Law School was intended for white students. 153a.

After weighing the examples of persistent vestiges of discrimination including those cited above, the district court found that "[t]he defendants have shown it is not possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority candidates." 156a. Dramatic proof of the need for affirmative action could be seen in the effect that elimination of race-conscious

relief would have on the racial composition of the student body at the Law School. The court made an evidentiary finding that "[h]ad the law school based its 1992 admissions solely on the applicants' [Texas Index scores] without regard to race or ethnicity, the entering class would have included, at most, nine blacks and eighteen Mexican Americans." 150a.

In addition to the evidence of the present effects of past discrimination considered by the court, the Petitioners sought to intervene twice to present evidence which showed that admissions practices currently in use had a discriminatory impact on African-American students. Petitioners identified and made known to State defendants an expert witness who was qualified to present evidence that race-conscious admissions to the Law School were necessary to avoid the unlawful racial discrimination (in violation of Title VI) that would result from application of the same Texas Index requirements to white and African-American students. This evidence was never properly before any of the courts below because of the State's refusal to present this defense and the lower courts' refusal to allow Petitioners to intervene to present this and other defenses.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In holding that the University of Texas Law School may not consider race as a factor in making admissions decisions, the Fifth Circuit Court of Appeals disregarded this Court's decisions while excluding evidence that provided ample justification for the use of race-conscious criteria in admissions. The Court's errors of deciding issues not fully presented by the case before it, of failing to recognize the significance of continuing effects of the State's prior unconstitutional conduct, and of rejecting the holding in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that the goal of diversity in higher education is a sufficient justification for considering race as a factor when

making admissions decisions, were compounded by its affirmance of the district court's denial of intervention to the Thurgood Marshall Legal Society and the Black Pre-Law Association, organizations which represent African-American students who attend the University of Texas Law School and the University of Texas.

The Fifth Circuit's decision to exclude the Petitioners from this litigation should be reviewed by this Court not only because it impedes their ability effectively to protect their interest in preserving an admission program that counters, rather than perpetuates, the effects of discrimination of which they were historical victims but also because the effect of the denial of intervention was to preclude the introduction of evidence that would have amply justified the use of race-conscious measures -- evidence the State refused to present and which only the Petitioners were prepared and willing to proffer at trial.

Constitutional questions as far-reaching as those raised in this case should be decided carefully after rigorous examination of all of the potential defenses and with consideration of all of the varying interests involved. Such rigor was absent in the decision below. Decisions made on a perfunctory basis are undesirable in any case. In this case, the effects were particularly serious. The failure to permit the parties who have the most to lose from a prohibition against race-conscious admissions to enter the case and the court's unwillingness to consider competent evidence that affirmative action was not only justified but compelled by the existence of present discrimination against African-Americans is particularly grave given Texas' long history of denying equal educational opportunity to the class of which Petitioners are members.

African-Americans increasingly find themselves reduced to the status of observers of Federal Court proceedings that result in loss of hard-fought achievements of earlier cases brought by their predecessors. The loss of

those achievements is felt even more harshly when, as here, African-Americans denied the opportunity to intervene are compelled to watch while the defense of their interests is placed entirely in the hands of entities which have for generations fought to deny them equal rights and which even today decline to use the most effective weapons in the arsenal of available defenses. The very same law school which was the subject of this Court's landmark decision in *Sweatt v. Painter*, which first opened the doors to legal education for African-Americans seeking to attend in Texas, has failed to adequately represent the interests of African-American students. This Court should review the panel's decision and take corrective action.

I. Certiorari should be granted to resolve a conflict among the Circuits as to whether the standard for intervention as of right on the side of a governmental agency is more stringent than the standard established by *Trbovich v. United Mine Workers*.

The court of appeals noted that the standard for intervention as a matter of right under Rule 24(a), Fed. Rules of Civ. Proc., ordinarily imposes a minimal burden on the movant, citing this Court's decision in *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972), holding that the requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate." 97a. The court below denied intervention to petitioners, however, by applying a "much stronger showing of inadequacy" because the party in question is a government agency, on the ground that in "a suit involving a matter of sovereign interest, the State is presumed to represent the interests of all of its citizens." 97a-98a.

There is substantial conflict and confusion among the courts of appeals as to whether the minimal *Trbovich* standard, or the Fifth Circuit's "much stronger" standard governs where the party whose representation is claimed to

be inadequate is a governmental agency. This is an important and recurring issue in the lower federal courts, and the conflict among them should be resolved by this Court.

The Second and Third Circuits have applied substantially the same *parens patriae* presumption as the one applied by the Fifth Circuit here. *See Brody by and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1122 (3rd Cir. 1992); *United States v. Hooker Chemicals & Plastics*, 749 F.2d 968, 987 (2nd Cir. 1984); *but cf.*, *United States v. New York*, 820 F.2d 554, 558 (2nd Cir. 1987)(*parens patriae* presumption applies only when state acts as the sovereign representative of all of its people, not applicable when state sued in its capacity as an employer under Title VII of the Civil Rights Act of 1964).

On the other hand, the Ninth and Tenth Circuits have applied the *Trbovich* standard consistently in cases where the party whose representation is claimed to be inadequate is a governmental agency. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *United States v. Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986), *opinion vacated and remanded on other grounds sub nom., Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *United States v. Oregon*, 839 F.2d 635, 637-38 (9th cir. 1988); *Sanguine, Ltd. v. United States Department of the Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984).

Still other Circuits have taken different positions in different cases. Thus, the Court of Appeals for the District of Columbia Circuit followed the *parens patriae* rule in *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C.Cir. 1979), but has permitted liberal intervention, holding that Rule 24 (a) is satisfied when it can be said that the applicant intervenor has an interest different from the governmental agency *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986); *accord*, *Mille Lacs Band of Indians v. Minnesota*, 989 F.2d 994, 1000-1002 (8th Cir.

1993)(announcing *parens patriae* rule, but following *Dimond* in liberally finding inadequacy of representation); *Meek v. Dade County*, 985 F.2d 1471, n.77-78 (11th Cir. 1993)(presumption of adequacy of representation dissipates upon any showing of divergence of interests). *See generally Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 41-43 (1st Cir. 1992)(noting the split among the other circuits while finding government representation inadequate in case at bar).

In short, it is clear that under the standard of the Ninth Circuit, for example, Petitioners would have been permitted to intervene, since the State of Texas would not and did not "make all the arguments the applicants would make." *United States v. Oregon*, 839 F.2d at 638. The same result would have obtained in the Tenth Circuit and, most probably, in the District of Columbia, Eighth, and Eleventh Circuits as well. As we will now discuss, the issues raised by this case, and the arguments and evidence that would have been made by the Petitioners had they been granted party status through intervention exemplify the ways in which erroneous decisions respecting intervention can affect a court's judgment on the merits and underscore the need for this Court to state the correct standard.

II. This Court should review the denial of intervention in this case which involves race conscious admissions in higher education and the continuing vitality of *Bakke* from which the panel improperly departed, and which should not be resolved without the evidence that Petitioners sought to present as Intervenors.

The Fifth Circuit's decision on the companion merits appeal was far ranging and broad in its scope:

> In summary, we hold that the University of Texas School of Law may not use race as a factor in

> deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.

76a-77a.

This single sentence not only sums up a holding purporting to relate to infirmities of the selection process used by the Law School in 1992 but also effectively articulates a fundamental departure from and narrowing of the permissible use of race in admissions in higher education. As recognized by the judges dissenting from the denial of *en banc* consideration,"[t]he radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation." 200a. That the panel saw fit to disregard and effectively to overrule this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) permitting the consideration of race for purposes of obtaining a diverse student body, is itself sufficiently problematic. That it did so in a case which did not require a large-scale re-examination of what constitutes a compelling interest justifying the consideration of race as a factor in admissions in higher education adds injury to the initial insult.

This judicial overreaching is particularly egregious because, in addition to the reasons cited in the dissents, had any of the lower courts granted Petitioners' intervention motions, an additional, narrower basis for deciding the issue of the constitutionality of race-conscious admissions would have been before the court.

Both the concurring opinion of the three-judge panel and the dissents from denial of rehearing *en banc*, faulted

the panel and the entire court for violating basic restrictions on judicial authority. As a preliminary matter, "[t]he Supreme Court has left no doubt that as a constitutionally inferior court [the Fifth Circuit is] to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it." 201a, *citing Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

In addition to the constraints imposed upon Courts of Appeals by decisions of the United States Supreme Court, judicial restraint counsels against deciding constitutional issues not necessary to the disposition of individual cases, a principal that the court below has recognized in other contexts but refused to apply in this case:

> [I]t is settled that courts have a "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979). This responsibility to avoid unnecessary constitutional adjudication is a fundamental rule of judicial restraint. *Three Affiliated Tribes v. World Engineering*, 467 U.S. 138, 157 (1984). All this, of course, applies not only to the Supreme Court but to lower courts as well. *See Bowen v. United States*, 422 U.S. 916 (1975).

Walton v. Alexander, 20 F.3d 1350, 1356 (5th Cir. 1994).

The Fifth Circuit violated both the charge to follow Supreme Court precedent and the prohibition against deciding unnecessary constitutional issues by treating this Court's decision in *Bakke* as no longer binding and issuing a blanket prohibition against the consideration of race in admission to the Law School:

> Rather than following this universally recognized canon, adhering to our established rules, and

> applying Supreme Court precedent, the panel charted a path into terra incognita. Judicial self-restraint was the first casualty . . . . The teachings proscribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule *Bakke*.

205a.

The exclusion of Petitioners, and of the arguments and evidence that they sought to introduce is particularly ironic given the fact that those arguments and evidence would have expressly addressed the panel's concern that there was insufficient showing of a factual basis for the Law School's belief that it had a remedial justification for its racial classifications. 43a, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-78 (1986).

Petitioners sought to intervene precisely for the purpose of providing such remedial justification. They initially suggested to defendants that the Texas Index measure is invalid as to African-Americans and that its use in the admissions process had a discriminatory effect on African-Americans. As soon as it became clear that the State would not use this defense, Petitioners sought to introduce it themselves through a declaration prepared by Dr. Martin Shapiro. In his declaration, Dr. Shapiro summed up the results of his examination of the evaluation of statistics about the Law School's entering classes of 1986, 1987 and 1988 that were in the trial record:

> Specifically, I have concluded (1) that regression analysis results obtained by the Law School Admission Services [Plaintiffs Exhibits 136 and 137] conclusively demonstrate that the selection criteria which the Law School has used to evaluate African-American applicants were invalid, (2) that the Texas

> Index should not have been used as an initial sorting criterion for African-American applicants, but (3) that the practice of reducing the numerical values of the Texas Index required of African-American applications had, at least some, ameliorative effect upon the invalid application of the Texas Index.

Shapiro Declaration at ¶7.

Shapiro further concluded that "[t]he best, most valid, [admissions] procedure would have been to eliminate the use of the Texas Index as an initial sorting criterion for the African-American applicants and to proceed directly to the more extensive evaluation and review of the applications." Shapiro Declaration at ¶35. Failing that, however, lowering the Texas Index values used to sort African-American applications -- the course actually taken by the Law School -- "at least partially ameliorated the invalid preclusive effect of the Texas Index" by disfavoring fewer blacks under a measure that was invalid for them as a group. *Id.* at ¶37.

In contrast, Dr. Shapiro found that "the *least* valid procedure would have been to sort initially all applicants by applying the same required Texas Index values to both White and African-American applicants" *id.* at ¶ 38 (emphasis added) -- the alternative sought by plaintiffs. The result of this process would be to eliminate unlawfully "almost all African-American applicants, generally, and to eliminate many or all of the most qualified African-American applicants." Shapiro Declaration at ¶ 18.

The use of invalid measures that have a discriminatory effect on African-Americans is unlawful. *See* 34 C.F.R § 100.3(b)(2)(1993) (U.S. Department of Education regulations implementing Title VI); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984)(use of non-validated IQ tests with discriminatory effect on black children to place students in classes for the educable mentally retarded violates Title VI); *Groves v. Alabama State Board of*

Education, 776 F. Supp. 1518 (M.D. Ala. 1991) (enjoining, under Title VI, state board of education from using minimum ACT score as requirement for admission to undergraduate teacher training program); *see also United States v. Fordice*, 505 U.S. at 718-719,(expressing serious doubts about the constitutionality of Mississippi's continued use of ACT cut-scores for admission to its white colleges).

Compliance with anti-discrimination law requires eliminating or diminishing reliance on invalid, discriminatory measures as to those groups that are disproportionately excluded. *See Kirkland v. New York Dept. of Correction Services*, 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981) (Title VII decision affirming trial court's addition of 250 points to the raw scores of group adversely impacted by invalid examination); *Association Against Discrimination in Employment v. City of Bridgeport*, 594 F.2d 306 (2d Cir. 1979) *cert. denied* 455 U.S. 988 (1982)(Title VII decision suggesting lowering the cut-off score for minority test takers as suitable remedy for an invalid test with a discriminatory effect).

Evidence of the continuing discriminatory effect of the Texas Index complements the extensive record of OCR findings of persistent vestiges of discrimination and demonstrates the unequivocal existence of present effects of discrimination. In light of the totality of the evidence, the challenged admission process was not a racial preference but rather a necessary and lawful response to the invalidity of applying this measure to African-American and Mexican-American applicants.

The failure of any of the courts below to address this evidence at any level creates an inadequate foundation for the broad-reaching decision rendered by the Fifth Circuit. This Court should grant certiorari on both the merits petition and this petition to assure that in reaching its decisions on issues that will have a dramatic impact on both institutions of higher learning and African-Americans, the

Court has the benefit of the full presentation of relevant evidence which is obtained only through adequate representation of important interests and argument on behalf of all parties.

III. This Court should review the denial of Petitioners' motions for intervention because the bases upon which the court below affirmed the trial court's denials conflict with relevant decisions of this Court and depart from accepted standards of judicial conduct.

Despite the strong interest Petitioners have in the outcome of this matter, and the fact that they would have brought to the litigation relevant evidence rejected and disregarded by the party which the Court entrusted to defend and represent their interests, the courts below have repeatedly denied them intervention. This denial is inconsistent with the ruling of this Court and prevailing decisions in other circuits.

On no occasion has a court held in this case that Petitioners' bid for intervention as of right should fail because it was untimely, or because Petitioners lacked an interest relating to the subject of the ongoing litigation or did not face the prospect of suffering an impairment or impediment to their ability to represent their interests. Petitioners, African-Americans who are present and prospective students of the Law School, have an undeniable interest in assuring continued opportunities for non-discriminatory admission and retention. *See United States v. Fordice*, 505 U.S. 717, 723 (1992) (recognizing role of private plaintiffs in vindicating their interest in elimination of vestiges of discrimination in prior dual university system); *Knight v. Alabama*, 14 F.3d 1534, 1540 (11th Cir. 1994)(recognizing interest identified in *Fordice)*. The Fifth Circuit's prohibition on the consideration of race in admissions notwithstanding (a) the past history of discrimination against African-Americans at the Law School

and throughout the state educational system, (b) the discriminatory impact of the use of the Texas Index and (c) the desirability of maintaining diversity coupled with the virtual certainty that strict use of the Texas Index without considering race would greatly reduce the number of African-Americans admitted to the Law School each provide ample proof of the extent to which Petitioners' interests were subject to impairment.

The Fifth Circuit sought to justify the denial of intervention by determining that the existing parties were able adequately to represent the Petitioners' interests. This finding is contrary to prevailing law and counter to the facts of this case.

This Court has held that an applicant for intervention can satisfy the requirements of Fed. R. Civ. P. 24 (a)(2) by demonstrating that representation by the existing parties *may* be inadequate and that the burden of making that showing is minimal. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (reversing denial of union member's motion for leave to intervene in suit brought by Secretary of Labor pursuant to complaint by that member).

The district court denied the first motion for intervention by employing a standard more stringent than that articulated by this Court in *Trbovich*. Petitioners raised the possibility of conflict in the State's defense of its affirmative action program, noting that the State represented a multiplicity of interests of its numerous citizens, some of whom likely would not share Petitioners' concern for the maintenance of race-conscious admissions, and that the State was potentially liable for acts of discrimination against African-Americans and might thus be less than vigorous in raising defenses that might expose it to liability. Petitioners also made clear their intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device. Despite these clearly articulated reasons for believing that the State would not adequately

represent the interests of African-American students, the district court rejected the potential conflict as being speculative. 193a.

Relying on a number of cases in which the state appeared in either a regulatory, enforcement or *parens patriae* capacity, the Fifth Circuit applied a much stronger "state government" presumption of adequacy. 96a.

This presumption was applied in a way which made intervention virtually impossible. Even though there were clearly articulated conflicts in the State's interests in sustaining both its affirmative action plan and its other Law School admissions criteria and even though the State was not only appearing in its *parens patriae* capacity but also as an entity that had constructed and maintained a dual system of education which discriminated on the basis of race and continued to employ practices in admission to the Law School which had a disproportionate impact on African-Americans, the Court below found the presumption of adequate representation was not rebutted.

The second ground for upholding the denial of intervention created a similarly difficult barrier to Petitioners' participation. The Fifth Circuit effectively relied upon a presumption of altruism on the State's part:

> Although the BPLA and the TMLS may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the State. The BPLA and the TMLS have been authorized to act as amicus and we see no indication that the State would not welcome their assistance.

98a.

By so holding, the Fifth Circuit effectively transformed the legal standard from one under which a potential intervenor must make a minimal showing that existing parties *may* not adequately represent the

intervenor's interest to one under which a movant is required to show that existing parties will categorically refuse to assert a specific defense or introduce specific evidence. Short of obtaining an affidavit or pleading indicating hostile intentions, it is difficult to imagine how such a burden might be met.

The error of enforcing these heightened standards was highlighted by subsequent events in the proceeding. After the State's presentation at trial made clear that the State would not offer Petitioners' defense and evidence and that the Petitioners' interests would be impaired, both the district court and the Fifth Circuit still denied intervention. Neither court addressed the fact that Petitioners' defenses and evidence had undeniably been excluded from the proceedings as a result of the denial of intervention. The district court order contains no discussion whatsoever of the facts. 188a-189a. By its misplaced reliance on the "law of the case" doctrine, the second panel of the Fifth Circuit successfully evaded the impact of its earlier decision.[6] Thus, although Petitioners were proven correct in their belief that the State would not adequately represent their interests, their claims were never properly addressed.

Nor can Petitioners find consolation in the fact that the Fifth Circuit held out the possibility of a new Title VI action directed at the discriminatory effect of the Texas Index. This invitation serves only to emphasize how the courts below subverted the very purposes of the Federal Rules of Civil Procedure by denying intervention. Although it is true that Petitioners could file a new complaint, disposition would have to await the completion of a lengthy and costly new round of litigation on the identical issues

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[6]The assertion by the court below that the first panel "implicitly" passed upon the adequacy of Petitioners' Texas Index claims as a basis for intervention if the evidence were not presented by the State is patently wrong.

raised in the instant case.[7] This clearly frustrates the goal of judicial economy and fairness which inform Fed. R. Civ. P. 24, whose purpose is "to foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977); *United States v. Texas Eastern Transmission Corporation*, 923 F.2d 410, 412 (5th Cir. 1991) (*quoting Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (*en banc*)); *Washington Electric Company v. Massachusetts Municipal Electric Company*, 922 F.2d 92 (2d Cir. 1990); *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir.) *aff'd* 495 U.S. 82 (1989).

The effects of the decisions denying intervention in this action on the ability of African-American Petitioners to protect their interests in being free of discrimination in seeking admissions to the Law School are only exacerbated by the manifest unfairness of excluding the class of victims of prior constitutional and statutory discrimination from proceedings which will have an impact on the very programs designed to remedy prior violations against African-Americans. The unseemly prospect of relegating Petitioners to the role of sideline observers to proceedings that may affect their own future educational opportunities requires

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[7]In fact, the suggested new action would more successfully create a Gordian knot than assure the vindication of all potential interests. Were Petitioners to be successful in an attack alleging the discriminatory effect of the Texas Index either through the judgment of a court or agency or consent judgment with the State, any remedy would be subject to attack by plaintiffs or any similarly situated non-minority Law School applicant. *See Martin v. Wilks*, 490 U.S. 755 (1989). Assuming that the same standard of intervention applied to white movants for intervention as was used for Petitioners, their sole means of recourse would be the initiation of a new action against the State, from which Petitioners again would presumably be excluded. With no reasonable end in sight to these needlessly restricted hearings, the effect on the fair and efficient functioning of the judicial process would be grave.

the grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, Petitioners Thurgood Marshall Legal Society and Black Pre-Law Association respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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